STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY HARDIE, JR.,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 196829
Oakland Circuit Court
LC No. 95-141855-FH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, second offense, MCL 333.7401(2)(a)(iv); MSA 14.15 (7401)(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). He subsequently pleaded guilty to felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to two to forty years for the possession offense, one to five years as an habitual offender, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support his felony-firearm conviction. We disagree. A conviction on the charge of felony-firearm is supported if the prosecution proves beyond a reasonable doubt that the defendant possessed a firearm during the commission of or attempt to commit a felony. *People v Davis,* 216 Mich App 47, 53; 549 NW2d 1 (1996). Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to defendant." *Id.* at 470-471. See also *People v Terry,* 124 Mich App 656, 659; 335 NW2d 116 (1983).

We review challenges to the sufficiency of evidence to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992). We view the evidence in the light most favorable to the prosecution and will not interfere with the jury's role of weighing the evidence and deciding

questions of fact. *Id.* at 514-515. We hold that a rational trier of fact could find that the essential elements of felony-firearm were proved beyond a reasonable doubt in this case.

There was evidence that defendant lived at the house and occupied the bedroom where the guns were found. Defendant also admitted that he knew where the rifles were located at the time of the police raid. The firearms were located 30 feet away from the bathroom, where defendant emerged when the house was raided, and about 15 to 20 feet away from the front door of the home. Testimony of one of the police officers indicated that the weapons could have been reached by defendant within seconds. Due to the effort it took for police to gain access through the reinforced front door, defendant would have had ample time and opportunity to obtain the firearms if he had chosen to retrieve them from the bedroom. Because there was evidence that defendant had knowledge of the location of the firearms and the firearms were readily available, there was sufficient evidence upon which a reasonable jury could conclude that defendant constructively possessed the firearms during the commission of a felony. See *People v Samuel Williams (After Remand)*, 198 Mich App 537; 499 NW2d 404 (1993); *People v Becoats*, 181 Mich App 722; 449 NW2d 687 (1989); and *Terry, supra.*

Defendant also argues that because the rifles were unloaded, they presented no danger to anyone involved in the situation. Thus, he concludes that his conviction is contrary to the legislative intent behind the felony firearm statute, which is to reduce the possibility of injury to victims, passersby and police officers. *People v Ben Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). In *People v Stephenson*, 94 Mich App 300, 301-302; 288 NW2d 364 (1979), we rejected a similar argument. We held that "firearm" within the meaning of the felony-firearm statute includes guns both loaded and unloaded which *may* fire a dangerous projectile. *Id.* (emphasis added). In *People v Broach*, 126 Mich App 711, 715-716; 337 NW2d 642 (1983), we confirmed that inoperable firearms are included within the felony-firearm statute. Furthermore, this Court has held that no nexus between the felony and the firearm need be established in order to obtain a conviction. *People v Elowe*, 85 Mich App 744, 747-748; 272 NW2d 596 (1978). Defendant's argument that the absence of bullets in the rifles precludes a felony-firearm conviction has no merit.

Next, defendant argues that the trial court improperly admitted evidence of three incidents involving defendant's prior conduct with drugs. We disagree. The admissibility of other bad-acts evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [emphasis added.]

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), the Court clarified the standard for the admission of evidence of other crimes or wrongs. The evidence must be relevant to an issue other

than propensity under rule 404(b); must be relevant under MRE 402; and must not be more prejudicial than probative under MRE 403. *Id.* at 74-75. In addition, the trial court, upon request, may provide a limiting instruction. *Id.* at 75.

The trial court admitted evidence of three incidents wherein defendant was found in possession of cocaine in circumstances indicating that the cocaine was possessed for sale purposes. In 1989, particles of cocaine were found on a counter by a window where people were observed coming and going. Defendant was occupying the house where the raid took place and there were three rifles there. In addition, while the police were conducting the raid, a woman, holding a twenty dollar bill, knocked on the window. Expert testimony indicated that the selling price of a rock of cocaine the size of a pencil eraser is ordinarily twenty dollars. In 1991, defendant's automobile was searched and individual packets of cocaine were found under the seat. There were approximately 15 rocks of cocaine. In 1993, after defendant left the back seat of a police car, five rocks of cocaine were found. Expert testimony indicated that addicts normally use cocaine as soon as they get it and they usually only buy one rock at a time.

The trial court allowed the evidence, stating:

> Due to the factual nature of this case and the nature of the charge, the prosecution has to establish intent to deliver. Intent being rather the critical issue in this matter. And with the other circumstantial aspects or nature of the case, it does -- this type of evidence does seem to be more provative [sic] than prejudicial and I'll allow it.

We affirm the ruling of the trial court. The evidence was admitted for a proper purpose under MRE 404(b), that being to show intent to possess drugs for resale[1]. The evidence was also relevant under MRE 402. Although the evidence was prejudicial, we find that the trial court did not abuse its discretion in holding that it was more probative than prejudicial. There was no showing that the danger of unfair prejudice substantially outweighed the probative value in showing intent. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909. "Unfair prejudice does not mean damaging." *Id.* at 75. In addition, the trial court gave a limiting instruction with regard to the evidence. Since the “other act” evidence was not used to prove the character of defendant in order to show that he acted in conformity therewith, the evidence was properly admitted.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] Plaintiff also argues that the evidence was properly admitted to show that defendant had knowledge of the narcotics that were found in the house during the police raid. We disagree. The evidence of defendant's prior possession of narcotics was not relevant to his knowledge that there was cocaine in the house on the night in question. In addition, the evidence was not necessary to demonstrate that

defendant had a knowledge about cocaine in general because defendant admitted that he had used cocaine and thus, admitted that he was familiar with it.